

A Year in Review: COVID-19 in Israel

Tamar Hostovsky Brandes

2021-04-13T12:17:47

The past year has been marked in Israel not only by the COVID-19 pandemic, but also by an unprecedented [political crisis](#). On March 2nd, 2020 a third round of elections within the course of a year took place in Israel. Israel's 35th government was sworn in on May 17th, 2020 as a "[Unity Government](#)", with Netanyahu as prime minister and Benny Gantz, Netanyahu's former contender, in the newly-established role of "alternative prime minister". Under the unity agreement between Netanyahu's Likud party and Gantz's Kahol-Lavan party, Netanyahu would serve as prime minister for a period of 18 months, after which he would be replaced by Gantz for the same period. The [agreement](#) endorsed a principle of power-sharing between the two, and stipulated that a voting mechanism would be established to ensure the equal voting power of each of the two partners. The establishment of the Unity Government was justified by the two former contenders as necessary in light of the challenges posed by the COVID-19 pandemic.

However, it became clear early on that the Unity Government is ridden with dispute, is unstable, and is not functioning in accordance with the unity agreement. The voting mechanism was never established. Netanyahu and Gantz failed to achieve agreements on major topics, and continuously exchanged [accusations](#), each blaming the other for the government's disfunction. Finally, on December 23, 2020, the Knesset dispersed after it failed to pass a state budget, as required by law. Israel is thus off to elections, again, scheduled to take place on March 23, 2021, a year after its last elections. This while [Netanyahu's trial](#), which opened on May 24, 2020, is looming over the political crisis.

Israel's response to the pandemic thus took place in an unstable and highly polarized political climate. This affected the decisions taken in several ways. First, throughout the crisis, it was difficult to achieve agreement within the government on required actions. In addition, decisions often reflected political rather than professional considerations, a problem that was exacerbated by the instability of the coalition. The prospect of additional elections also effected the political will to enforce restrictions, in particular in the Ultra-Orthodox sector, as Ultra-Orthodox parties are perceived by Netanyahu as necessary partners in any government coalition.

The Legal Framework – From Emergency Regulations to Legislation

The legal framework in Israel in responding to the pandemic has considerably changed throughout the course of the year. The initial measures implemented in response to the pandemic were based on [two main pieces of legislation](#).

First, article 39 of the “[Basic Law: The Government](#)” authorizes the government to issues emergency regulations in a general state of emergency. In Israel, a state of emergency has been declared by the Knesset (the Israeli legislature) on security grounds and continuously extended since the establishment of the state in 1948. At the beginning of the pandemic, the government built on the existing state of emergency to issue a large number of emergency regulations, implementing, among other measures, movement and gathering restrictions, surveillance and contract tracing measures, regulation of the labor market and court system, and more.

The second law employed at the beginning of the pandemic is the Public Health Ordinance of 1940 (the “Ordinance”), a legacy of the British Mandate that is still in force, which authorizes the Ministry of Health to take measures needed in order to protect public health, including to issue orders necessary in order to contain an infectious disease. The Ordinance also contains special authorities that can be employed when a severe risk to public health is declared. COVID-19 has indeed been declared to pose such a risk, and special authorities have accordingly been invoked. Orders issued under the Ordinance include, for example, isolation and quarantine requirements, the requirement to wear masks, and certain gathering restrictions.

The vast use of emergency regulations raised public criticism, and petitions were filed to the Supreme Court both against specific emergency regulations, such as those [authorizing](#) the General Security Service to employ electronic surveillance measures for contact tracing, as well as generally against the [use of emergency regulations](#). The claims were that, while the use of emergency regulations could be justified for a short period of time or in the absence of a functioning *Knesset*, and while the pandemic may justify certain restrictions on individual rights, rights should generally be restricted only through primary legislation.

As a result of these critiques, the Knesset set to replace the use of emergency regulations with laws. The two most important laws enacted by the Knesset in this regard are the [Law of Special Authorities to Deal with the Novel Coronavirus \(Temporary Provision\) 2020](#) (the Corona Law), enacted by the Knesset on July 23, 2020, and Law Authorizing the GSS to Take Part in the National Efforts to Minimize the Spread of the Novel Coronavirus and Promoting the Use of Civilian Technology to Trace Those Who Were in Close Contact With the Ill) (Temporary Order) 2020, enacted by the Knesset on July 1, 2020.

The Corona Law authorized the government to declare a COVID-19 emergency situation for a period of 45 days, to be extended for periods of up to 60 days. A COVID-19 emergency situation was declared with the enactment of the Corona Law and extended to this day. The Corona Law has a sunset clause according to which it will expire on June 30, 2021, unless extended. The enactment of the Corona Law replaced Basic Law: The Government as the main act (in addition to the Ordinance) authorizing the government to issue regulations imposing restrictions in order to contain the pandemic. While Basic Law: the Government allowed the government to issue emergency regulations without specifying the purposes or measures, , the Corona Law contains a closed list of authorities.

Nonetheless, the Corona Law has been [criticized](#) for allowing extensive restrictions, and for the fact that while it contains a mechanism for parliamentary supervision of the regulations issued, supervision is ex-post rather than ex-ante. Specific concern has been raised regarding [Amendment No. 2](#) of the Corona Law, which authorized the government to declare a “special coronavirus emergency situation”, a situation which grants it the power to limit demonstrations. The declaration of such situation, and the temporary limitation of demonstrations that followed it were argued to be a political abuse of the pandemic and raised concerns that other abuses may follow.

Legislative and Judicial Oversight – To What Extent Did They Make a Difference?

Parliamentary supervision of the executive measures taken changed throughout the year. Emergency regulations issued under Article 39 of Basic Law: The Government do not require approval of a parliamentary committee. Since this was the main tool employed at the beginning of the pandemic, and coupled with the fact that Israel was, at the time, in a period of transition and [without functioning parliamentary committees](#), oversight of the measures taken was weak during the first months of the pandemic.

After the establishment of the Unity Government and the setup of parliamentary committees, including the setup of a special COVID-19 parliamentary committee, parliamentary oversight became more meaningful. Following the enactment of the Corona Law it also became more structured, as the Corona Law does include a mechanism of parliamentary oversight of the regulations enacted pursuant to it. That being said, parliamentary oversight is still far from satisfactory. First, the Corona Law sets up a mechanism that require a parliamentary committee to approve the regulations after they were enacted, rather than before. In addition, the Corona Law allows flexibility in directing regulations to specific parliamentary committees for approval, allowing the government to circumvent parliamentary committees it perceives as less lenient.

The relative weakness of parliamentary overview turns the spotlight to the Supreme Court. The Israeli Supreme Court is generally perceived to be activist, accessible, and not to shy away from controversial matters. In light of this, one might have expected it to perform a significant role in overseeing and supervising measures imposed by the government, especially when applied under emergency powers and involving significant restrictions of individual rights.

In practice, however, the Supreme Court has been exceptionally restrained in overseeing measures implemented by both the government and the Knesset. Dozens of petitions have been filed to the court during the course of the year, challenging measures such as general and local lockdowns, movement restrictions, restrictions on prayers, closing of borders, the closing of educational institutions and economic redress measures. Some of the petitions challenged the necessity of measures. Other focused on distinctions between groups made by various measures or the criteria underlying them. [The vast majority](#) of the petitions have been rejected

by the court. Notably, many petitions have been rejected on the grounds of failure to exhaust measures. In other cases, the court has accepted the state's position regarding the necessity of the measures implemented at face value. Basic Law: Human Dignity and Liberty, which lays down the constitutional framework for reviewing restrictions of rights, requires such restrictions to be for a "proper purpose" and proportional. In petitions related to the pandemic, the court has generally simply accepted the state's claim that the measures taken fulfill these requirements, without requiring the government to substantiate its claims via evidence.

There are a few notable exceptions. On March 1, 2021, the Court has [limited the use of use of military surveillance technology](#), restricting its use to individuals who don't cooperate with investigations. On March 17, 2021, the Court decided that [regulations imposing limitations on the entry of Israeli citizens](#) to Israel and on those wishing to leave the country down could not be extended after they expire, as they are unconstitutional, in particular in light of their possible effect on the right to vote in the Israeli elections, held on March 23, 2021. On April 4, 2021, the Court [determined](#) that a [regulation](#) that had expired months earlier, limiting demonstrations further than 1km from one's home was unconstitutional. All of these decisions, however, were delivered relatively late in the course of events. In addition, the remedy received was either late or partial: the Court did not prohibit the use of tracking, but only limited it. It did not invalidate the law authorizing the government to restrict demonstrations, but only the already-expired regulation. And while it did determine that a cap of 3000 on the number of Israelis that could enter the country was unconstitutional, it declared the regulations could not be extended rather than that they were immediately void.

2021 Outlook – What Now?

The specific human rights concerns changed throughout the pandemic. In the first months, gathering restrictions, including limitations on the demonstrations and prayers, economic redress measures and contact tracing tools stood at the center of concerns. However, as the crisis unfolded, other issues took the stage. Current human rights concerns involve, for example, the closing of Israel's borders, including to Israeli citizens wishing to enter the country, the decision to use electronic cuffs to monitor home isolations, and the measures that may be taken in order to encourage people to vaccinate.

Two additional human rights related concerns arose throughout the pandemic. The first is the lack of order, clarity and transparency in the enactment and publication of COVID-19 regulations and limitations. While time indeed is of an essence in a situation of emergency, the potential for abuse of the situation for unjustified restrictions of rights renders due process especially important. However, all throughout the crisis, the process of enactment of regulations that severely restrict individual rights was hasty and non-transparent. Voting on serious restrictions was conducted through text messages among cabinet members, without presentation of factual grounds justifying limitations of rights and without proper debate or discussion. Regulations were often published few hours before they entered into force, with non-accurate descriptions of them published earlier in the media, creating

uncertainty among the public regarding the law in force. Finally, discussions of the COVID-19 cabinet established by the government have been declared confidential for 30 years, sparking speculation and public distrust.

The second issue regards enforcement policy of COVID-19 regulations. Throughout the pandemic, [media outlets reported](#) differences in enforcement measures among populations and sectors, an issue which raised public fury. Notable criticism has been raised with respect to enforcement in the Ultra-Orthodox sector, following reports of a large number of violations of restrictions on gathering, and, in particular, violations of the regulations ordering school closures. Media outlets have also pointed the [relatively small number of fines](#) dispensed within the Ultra-Orthodox sector for violations of the regulations, despite the appeared prevalence of such violations. It has been argued that with the Ultra-Orthodox parties necessary for Netanyahu to form a coalition in the upcoming elections, the decision to refrain from enforcement in the Ultra-Orthodox sector is political.

An event such as the COVID-19 pandemic is inherently ridden with uncertainty. However, in Israel, the decision-making process was also tainted as politicized, which casted a shadow of illegitimacy on the restrictions enacted. In addition to the ongoing concerns regarding extreme restrictions of specific rights, the pandemic in Israel also raises more general concerns regarding the state of the rule of law in what is already a fragile democracy.

